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FILE
SEP 5
JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 386

JOHN J. DOYLE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, John J. Doyle, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered on April 15, 1955, and is not reported but appears in the Record filed with and certified by the Clerk of the Court of Appeals below, and transmitted herewith at Page 952 of the Transcript of Proceedings.

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment, was filed May 23, 1956, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the Record.

JURISDICTION.

On August 6, 1956, it was ordered that the Petition for Rehearing be denied (the Orders of the Court of Appeals appear in the Appendix to this Petition). This petition is filed within 30 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where the elements of the offense charged in each Count of the indictment constitute no more than a misdemeanor in violation of Section 3616(a) of Title 26 (*Berra* v. *U. S.*, 351 U.S. 131), did the trial Court err in imposing a sentence in excess of one year imprisonment, and $1000 fine, the punishment fixed by Congress for such misdemeanor?

2. Did the Court of Appeals below err in denying a request to remand to the District Court for sentence in accordance with the charge in each Count of the

indictment, and the punishment fixed therefor in Section 3616(a) of Title 26, U.S.C., by Congress, on the ground that the excessive sentence imposed was not attacked in the trial Court, or until Petition for Rehearing in the Court of Appeals and, therefore, came too late, and was not plain error affecting substantial rights?

3. Was it abuse of discretion amounting to reversible error, in an income tax evasion prosecution to deny to the defendant all details of information concerning the method of computation of the additional income alleged in the indictment, and to deny in all respects a proper and timely application for particulars, before trial, where a showing was made that such information was necessary for adequate preparation of accounting matters of defense, and the conviction is based on proof of deficiencies by use of what the Government calls the "bank deposit" and "net worth" methods of computation of unreported income?

4. Did the Court of Appeals below err in sustaining the conviction so secured, on the ground that disclosure of facts concerning methods of computation would be disclosure of theory of law upon which the Government expected to proceed, where the record shows prejudice to the defendant through lack of time to sufficiently acquaint himself with voluminous detailed computations admitted into evidence against him?

5. Was it plain reversible error to submit to the jury, without any instructions, guarding or otherwise, complicated accounting charts prepared by a Government witness for the purpose of the trial, and including a summary of the items of evidence relied

upon by the Government to support calculations of deficiency in reported income under the net worth method and the bank deposit method, in a case where principal items such as cash on hand at the opening and close of taxable periods involved, were in serious dispute?

6. Was it reversible error to refuse an adequate and proper instruction offered on the subject of evidence of the defendant's prior good reputation, and to substitute therefor an erroneous instruction, R. 920, which, in part, commanded the jury "You cannot acquit him merely because you may believe he has been a person of good repute", which destroyed any benefit that may have accrued to the defendant from the evidence of prior good reputation, and from any prior language in the instruction, and could reasonably be considered as having misled the jury into ignoring the defendant's evidence in this regard?

7. Did the prosecutors' persistent efforts resulting in directing the jury's attention to prejudicial irrelevant matters, and the arguments to the jury thereon, deprive the defendant of a fair trial, and thus result in plain reversible error, where the defendant was charged in the arguments with corruption of law enforcement officers, and association with juvenile delinquency, and with OPA violations, none of which matters was supported by the evidence or related to the charge in the indictment?

STATEMENT OF THE CASE.

The petitioner, John J. Doyle, was convicted on two Counts of an indictment charging violation of the Internal Revenue laws, one Count charging a violation with respect to the year 1947 and the second Count charging a viola-

tion with respect to the year 1948. Each Count charged that the petitioner attempted to evade and defeat a large part of the income tax due and owing by him and his wife to the United States for the respective year by filing a false return for each year. The claimed understatements of income tax were approximately $21,000.00 for the calendar year 1947 and approximately $18,000.00 for the calendar year 1948 (R. 2-3).

The petitioner filed a timely motion for a bill of particulars (R. 6), supported by memorandum, and by the affidavit of his accountant concerning the necessity therefor (R. 9). With regard to each Count, the motion requested the following:

1. The method by which "joint net income" for the calendar year 1947 is determined, by setting forth the gross income alleged to have been received by defendant and his wife, and the amount of deductions and credits allowed in arriving at the alleged "joint net income."

2. The source or sources of the "joint net income" charged to have been received by defendant and his wife during the calendar year (1947), with the amounts asserted to have been received from each source.

3. The nature and amount of deductions or credits, if any, claimed on the return under Indictment which were disallowed in arriving at the alleged "joint net income" for the calendar year (1947).

4. The method used in reconstructing the income of the defendant and his wife for the calendar year 1947. (R. 6).

This motion for particulars was denied in all respects (R. 10), and the petitioner was refused all information regarding the details mentioned until the evidence was pre-

sented against him during the trial (R. 18, 19, 446-449, 490, 492, 634, 635).

The trial was a jury trial before the Honorable Cale J. Holder, Judge of the District Court for the Southern District of Indiana, and extended from January 11 to January 29, 1955. After a verdict of guilty on both Counts the petitioner was sentenced to a term of two years' imprisonment and a fine of $10,000.00 on Count 1 and sentenced to a term of two years' imprisonment on Count 2, the sentences to be served concurrently (R. 952-953).

On May 23, 1956, the United States Court of Appeals for the Seventh Circuit filed its opinion and entered judgment affirming the conviction (see Appendix). A petition for rehearing was filed and while that petition for rehearing was under consideration by the Court of Appeals, the petitioner filed an emergency motion for leave to file additional petition for rehearing on June 15, 1956. This petition cited the decision of the Supreme Court in *Berra* v. *United States,* 351 U.S. 131. This motion and petition directed the attention of the Court to the fact that the indictment, in each count, alleged no more than a misdemeanor in violation of Section 3616(a) of Title 26, U.S.C., whereas the petitioner had been sentenced in excess of the punishment fixed by law in that Section, under the conception that the violation charged in the indictment was a violation of Section 145(b), Title 26, U.S.C. The motion requested reversal and remand, or in the alternative, a remand to the District Court for the purpose of entertaining a motion under Rule 35 of the Federal Rules of Criminal Procedure to correct an illegal sentence. It was suggested that after the District Court had acted upon said motion, the action thereon be certified to the Court of Appeals and that then the Court of Appeals make its final determination of the matter, and it was

further suggested that such a procedure would preclude a multiplicity of actions and appeals and would permit the earliest final disposition of the matter, with full and proper consideration by all Courts concerned.

The United States opposed this motion in an answer and brief which are included in the certified record filed herewith by the Clerk of the Court of Appeals.

On August 6, 1956, the United States Court of Appeals for the Seventh Circuit denied the petition for rehearing, and further ordered that the motion for leave to file additional petition for rehearing challenging the validity of the sentence imposed upon him be denied for the reasons stated in its opinion in *United States* v. *Achilli,* No. 11575 decided July 31, 1956 (see Appendix). A copy of the opinion in *United States* v. *Achilli,* No. 11575, United States Court of Appeals for the Seventh Circuit, dated July 31, 1956, has, therefore, been appended to this brief and is included in the record certified by the Clerk of the Court of Appeals.

THE EVIDENCE.

John J. Doyle, during the years in question, was married and a resident of Gary, Indiana (R. 716). During the years 1947 and 1948, he derived his reported income and losses from the Calumet News Company, a racing wire service and bookmaking partnership, The Calumet Novelty Company, a partnership operating and maintaining slot machines, and the 442 Club, a bookmaking partnership, all in the City of Gary, Indiana (R. 26-39, Gov. Ex. 1-8). The recording of daily receipts and disbursements from each partnership was made by the witness Crawford (R. 813) from daily reports, which were burned in 1950 (R. 785), and transmitted to the witness Slay (R. 501) who prepared the books and records of each partnership (R.

489-502). The witness Slay prepared returns for each partnership as well as the individual returns of the defendant for the years 1947 and 1948 (R. 498-499). The income reported on the defendant's returns corresponded to the income distributable to the defendant as disclosed on the partnership returns (R. 72), and the income of each partnership as shown on its returns corresponded to the income disclosed on the books of each partnership (R. 586).

The Calumet News Company began in 1945 as a partnership composed of the defendant, Irving Kirsch, Jesse Roberts and Jack W. Stone (R. 778). From the beginning of 1946 until June 14, 1947, the partnership consisted of the defendant, Irving Kirsch and Jesse Roberts, and after that date until the end of 1948 it was a partnership between the defendant and Irving Kirsch alone (R. 385). Up until June 14, 1947, the partnership supplied racing information to a number of bookmaking establishments, handled the recordation of betting and wins and losses through an employee stationed in the establishment, and divided the total winnings with the owners of the establishments, generally on an equal basis (R. 389). After that date, the partnership merely supplied racing information to others for a fixed fee, variable with the size of the location (R. 390). In 1948, the partnership began taking its own bets at one location, an operation responsible for approximately 90% of its profit in that year (R. 403).

The Calumet Novelty Company began in 1946, and remained an equal partnership between the defendant and the witness Crawford during the years in question (R. 43, 47, Gov. Exs. 7, 8). The business was conducted by furnishing slot machines to various locations together with a "load" for paying winners (R. 727), in return for a division of the winnings. The number of such locations

gradually increased during the years involved from 17 to 85 locations (R. 400-401). Some of the machines operated by the partnership were confiscated by the police in both 1947 and 1948 (R. 42, 45, Gov. Exs. 7, 8, R. 788-9).

The 442 Club reported as a partnership composed of the defendant, John A. Ellis, and Paul G. and Donald M. Dacey. The partnership began in 1943 and underwent several changes of partners prior to 1947 (R. 765). The partnership's bookmaking business was closed April 11, 1947, and did not reopen (R. 397).

In May, 1947, the defendant gave the witness O'Donnell $5,000 for the purpose of investment with the witness Jackson in a restaurant and bar known as Jackson's Restaurant (R. 83, 729). Both the defendant (R. 729) and the witness O'Donnell (R. 83) testified that the money given O'Donnell was a loan. Thereafter the defendant gave O'Donnell approximately another $15,000 in cash and checks for investment in the restaurant (R. 857-59). Checks of the defendant were also used to pay part of the purchase price of an air conditioner in the summer of 1948 (R. 355). Jackson and O'Donnell both actively worked in the business (R. 644, 651-652) and both were the only persons authorized to sign checks on the partnership account (R. 657).

The distributable income attributed to O'Donnell in the partnership returns in 1947 was $1467.59 (R. 86), and in 1948 was about $4000.00. O'Donnell, during these years, drew money out of the register when he wanted to, and estimated the total amount withdrawn in both years did not exceed $6000 (R. 87). In October, 1948, the defendant and O'Donnell had a conversation in which O'Donnell testified that the defendant offered to take over O'Donnell's interest in the business, incorporate it, and give O'Donnell

stock in the business (R. 91). The defendant testified that O'Donnell volunteered to turn over his interest in the partnership to him, effective Jan. 1, 1949 (R. 730). An assignment of the interest was made on the bottom of a copy of a partnership agreement between Jackson and O'Donnell (Def. Ex. B).

In November 1948 Jackson and the defendant opened a bank account in the name of Jackson's Restaurant, Inc. (R. 685). No receipts from the operation of the restaurant were put into this account during 1948 (R. 686). The only funds in the account in 1948 were put in by the defendant (R. 677-8, 686, 732), and the funds were used to purchase real estate adjoining Jackson's Restaurant (R. 108, Def. Ex. C, 225 Def. Ex. H, 246) or for earnest money on the restaurant property itself (R. 209). The acquisition of the Walsh property involved payment of the balance due on a contract entered into in June, 1947 by Jackson (R. 172-174 Def. Ex. E). Jackson's Restaurant was incorporated on December 1, 1948 (R. 276, Def. Ex. I). Ten shares were originally issued to Paul Jackson, nine shares to Veronica Lucas, and one share to Blaz Lucas (R. 271). Lucas was the defendant's attorney (R. 731), and Veronica Lucas was Lucas' wife (R. 274). On January 7, 1949, the shares of Veronica Lucas were transferred to the defendant (R. 272). The witness O'Donnell was put on the payroll beginning in January 1949 at approximately $80 a week after taxes (R. 92-93, 682), and remained in the employ of the restaurant until March of that year. O'Donnell testified he was called in to the back room of the restaurant on January 19, 1949 and told by the witness Slay that his income tax return was prepared and ready for him to sign. The defendant was present and told him that the restaurant had made about $21,000 in 1948 but that the money had been put back in the busi-

ness and there was insufficient cash to pay O'Donnell's taxes (R. 88). He offered to pay O'Donnell's taxes for the year, which he did by personal check marked "Account of John O'Donnell" (Gov. Ex. 10-A). Substantially the same version of the conversation was related by the witness Slay, except that Slay stated that O'Donnell was present when the return was prepared, other than the Schedule D (R. 514).

A bartender (R. 643) and a waitress (R. 650) employed by Jackson's Restaurant during the indictment years, testified that O'Donnell was present and took an active part in the management of the restaurant during the years in question, that they had not seen the defendant around the restaurant during this period, and had not known the defendant as an owner until 1949.

The witness Schreiber testified that the defendant told him on April 26, 1951, that he had been in partnership with Jackson in the restaurant for about four years, but that he had put his interest in the name of O'Donnell to protect the restaurant's liquor license (R. 310). Schreiber further testified that on Jure 13, 1951, he had a conversation with the defendant in which Schreiber asked the defendant about a statemen: allegedly made to other revenue agents that the defendant bought out O'Donnell's interest in the restaurant at the end of 1948. Schreiber testified that he asked him how this could be true if the defendant had paid O'Donnell's taxes for 1948, and that the defendant became very angry and admitted again that O'Donnell's interest in the restaurant was really his (R. 414-415). The substance of both conversations was denied by the defendant (R. 754-755). The witness Johnson, a revenue agent, corroborated Schreiber's version of both conversations (R. 830-831). The defendant could not remember whether he had testified before a grand jury

in Crown Point, Indiana, on January 16, 1951, to the effect that he had been a partner in Jackson's Restaurant for 4½ years (R. 810). The witness Burns, the secretary of that grand jury, testified that that answer had been given (R. 837).

Various witnesses were called to establish the existence of assets of the defendant on December 31, 1946, December 31, 1947, and December 31, 1948 (R. 101, 103, 107, 111, 114, 126, 170, 181, 184, 198, 199, 206, 207, 218, 220, 223, 226, 229, 243, 245, 277, 280, 287, 367), or to testify to expenditures from the defendant's back accounts and otherwise during the years 1947 to 1948 (R. 157, 166, 176, 188, 191, 200, 232, 248). The items about which each of these witnesses testified appear in and comprise Government's Exhibits 103 and 108 (Appendix A to Brief), with the exception of the figures for cash on hand and the estimate of living expenses of the defendant as they appear in those exhibits.

The defendant maintained joint checking accounts with his wife at two banks during most of the period in question (R. 116, 127). The defendant or his wife also had access to three safety deposit boxes, one jointly with his wife referred to as Box #475 (R. 141), one jointly with the witness Crawford, known as Box #A-2738 (R. 146), and one in the name of his wife and one Amelia Ludwig, known as Box D-899 (R. 147). The record of entries in each box disclosed that Box 475 was entered by the defendant alone at regular intervals from January through early November, 1947, August through November, 1948, and on January 4 and 5, 1949 (R. 145). Box A-2738, opened April 7, 1947 (R. 146), was entered regularly by Crawford alone during 1947 and until November 1948. Further entries to the end of the year were made by the

defendant (R. 149-152). All entries to Box D-899 were made by the defendant's wife (R. 154). Schreiber testified that the defendant told him that daily collections were put in the safety deposit boxes and taken out for deposit in the bank only when needed (R. 375). A comparison of entries to safety deposit boxes with bank deposits disclosed there were only 17 days in 1947 on which currency deposits were made (R. 441, Gov. Ex. 102) and two days in that year on which deposits were made without safety deposit entries (R. 441-442). In 1948 there were 23 days on which currency deposits were made, 11 appearing on days on which there were no entries to safety deposit boxes (R. 445). The witness Crawford testified that the cash receipts of the Calumet Novelty Company and Calumet News Company were intermingled in a safe at their place of business in Gary and taken from there to the safety deposit boxes (R. 819).

Schreiber testified that in a conversation with the defendant on July 30, 1952, the witness asked the defendant about two currency deposits made by him on January 5, 1949, in a total amount of $50,000 and that the defendant replied that money could not have represented 1949 income but must have been income earned in 1948. The witness asserted that he further admitted that as a general rule, all deposits in the first 15 days of any year represented income earned in the prior year (R. 425). The defendant denied that he had stated the money was income earned in 1948 or in any other year (R. 807). There was no other evidence of the defendant's income in the first 15 days of 1949 as disclosed by his books and records of any other source (R. 460), although the witness testified that he had asked for (R. 296) and received (R. 311) all of the defendant's books and records in 1951.

The witness Schreiber in preparing Government Exhibits 103 and 108, estimated the defendant's cash on hand

on December 31, 1946 to be $24,758, the amount of the defendant's bank deposits from January 1 to January 15, 1947 (R. 461, 539). By use of this figure, the defendant's net worth at the close of 1946 was made to appear to be approximately $79,000 (R. 551). Reconstruction of the defendant's income from 1941, the first year after 1920 in which the Government had a record of his having paid tax (Gov. Exs. 13, 101-A, 101-B), to 1946, indicated a total taxable income during the period of $184,430.19 of which approximately $170,000 was reported in 1945 and 1946 (R. 753, 801, Def. Exs. O, P). From this total the witness Schreiber deducted income taxes paid in the amount of $63,417.15, nondeductible gifts in the amount of $7000 and living expenses equal to net income after taxes in 1941 and 1942, $5500 per year for 1943 and 1944, $8000 for 1945, and $10,000 for 1946, to arrive at a net available for net worth at the close of 1946 of $79,629.54 (R. 530).

In his testimony the defendant estimated that his cash on hand at the close of 1946 was not less than $50,000 (R. 754), and could have been as high as $70,000 (R. 811).

Schreiber testified that the defendant estimated that his living expenses were not more than $10,000 a year (R. 423), but that an itemized estimate given by the defendant totaled in excess of $13,000 for 1947, and in excess of $12,000 for 1948 (R. 479). There was no evidence of the defendant's living expenses for any other year, except the testimony of the defendant (R. 736-738, 801, 803), and his wife (R. 710, 711, 715). The defendant admitted that neither he nor his immediate family had received any gifts or inheritances during or prior to the years in question (R. 807).

Three witnesses, a banker (R. 659), a funeral director and former O.P.A. Chairman and charity drive leader,

(R. 665), and the President of the Indiana State Bar Association and former member of the State Bar Examiners (R. 744) testified that the defendant's reputation for truth and veracity, honesty and integrity, and as a law abiding citizen was good.

REASONS FOR GRANTING WRIT.

This case presents an important question of federal law which has not been, but should be settled by this Court, that is, the validity of a sentence imposed upon conviction under an indictment which alleges facts which constitute a misdemeanor under Section 3616(a) of Title 26, U.S.C., where the sentence is in excess of the punishment authorized by Congress for such violation. This contention by the petitioner is based upon the recent decision of the Supreme Court in *Berra* v. *United States,* 351 U.S. 131, where it was held that an indictment similar in all principal respects to the one in the case at bar was indicated as being one which charged a misdemeanor under Section 3616(a) rather than a felony under Section 145(b), both of Title 26, U.S.C. In that case this Court held that the validity of the sentence had not been questioned and was not there considered. In the case at bar the petitioner now seeks to have the validity of the sentence determined by this Court.

The Court of Appeals below has decided a federal question involving the conduct of trials and procedural safeguards of substantial rights of defendants in income tax prosecutions in a way which is in conflict with applicable decisions of this Court, *Holland* v. *United States,* 348 U.S. 121. The Court of Appeals below further has adopted and sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court, which calls for an exercise of this Court's supervision, by affirm-

ing a conviction where the defendant was denied all details of information concerning the method of computation of additional income alleged in the indictment, where the prosecution was based upon complicated circumstantial methods of computation called the net worth method and the bank deposit method, and was thus deprived of adequate preparation of defense, and his right to be informed of the nature and cause of the accusation against him was infringed upon.

The Court of Appeals below has rendered a decision concerning the propriety of granting a bill of particulars which, in effect, vitiates Rule 7(f) of the Federal Rules of Criminal Procedure which provides for the granting of a bill of particulars. The decision is in conflict with the decisions of other Courts of Appeals, *Singer* v. *United States,* 58 F. 2d 74, 76, (3rd Cir.).

The decision of the Court of Appeals below with respect to its approval of the instruction concerning evidence of prior good reputation is in conflict with other decisions of the same Court and, in some respects, conflicts with decisions of this Court, *United States* v. *Donnelly,* (C.A. 7) 179 F. 2d 227, 233; *United States* v. *Semeniuk,* 193 F. 2d 508, 509, 510; *Michelson* v. *United States,* 335 U.S. 469, 477.

It is further contended that the Court of Appeals below has failed to recognize plain error created by the passionate and prejudicial conduct of the prosecutors in their persistent efforts to divert the jury's attention from the issues of the case on trial to prejudicial matters which prevented a fair trial free of prejudice, and the decision is thus in conflict with the decision of the Third Circuit Court of Appeals in *United States* v. *American Die and Instrument Works,* 213 F. 2d 731, and of the Fifth Circuit Court of Appeals in *Steele* v. *United States,* 222 F. 2d 628, 631.

I.

The indictment in this case (R. 2, 3) is in the standard usual form employed in many similar cases and is in all principal respects similar to the one involved in the case of *Berra* v. *United States,* 351 U.S. 131. In that case this Court held that the allegations of such an indictment constituted a charge of a misdemeanor under Section 3616(a), Title 26, U.S.C. In the *Berra* case the only question presented to any Court was the propriety of an instruction submitting the construction of the indictment to the jury.

The petitioner here has requested the Court of Appeals below to decide the validity of the sentence which was imposed, and which sentence was in excess of the punishment provided for by Congress in Section 3616(a), Title 26, U.S.C. The Court of Appeals below has stated in its order that it relies upon its decision in *United States* v. *Achilli,* No. 11575, entered July 31, 1956. In that decision, a copy of which is appended to this petition, the Court of Appeals has stated that it is impelled to determine that the imposition of an excessive sentence, if such was the fact, is not plain error.

The petitioner submits that this is an erroneous conclusion since the punishment in excess of that authorized by Congress is obviously an unconstitutional infringement of substantial rights and should be noticed wherever and whenever raised. It is respectfully submitted that Rule 35 of the Federal Rules of Criminal Procedure provides, in part, "The Court may correct an illegal sentence at any time." Certainly, a sentence in excess of that authorized by Congress is illegal. It is respectfully suggested that it is desirable and necessary for this Court to settle the question raised by this petitioner because it is one which is common to many suits now pending and so that prose-

cutors, defendants and trial Courts will be guarded in their disposition of cases based upon similar indictments.

The petitioner considers that the language of the opinions in the *Berra* case sufficiently demonstrates the arguments which can be made concerning the construction of the indictment in this case and the indictment in the *Berra* case.

It is respectfully suggested that if it is considered that this question of the validity of the sentence should be passed upon by the Courts below, by a motion to correct the invalid sentence, that it would be appropriate for this Court to remand the cause to the District Court for consideration of such a motion, and that this procedure would void a multiplicity of actions and appeals.

II.

The District Court in this case denied a motion for bill of particulars (R. 6, 10), which was filed in apt time under Rule 7(f) of the Federal Rules of Criminal Procedure, and was supported by a memorandum of law (R. 7, 8) and by the affidavit of an accountant stating his opinion that the information requested in the bill of particulars was necessary to the preparation of defense.

The details requested in the motion for particulars concerned the methods and factors by which the Government computed the alleged deficiency in reported income.

The petitioner recognizes that the grant or denial of a bill of particulars is a matter within the discretion of trial Courts under Rule 7(f) and the decisions of many Courts. However, it is urged that in income tax evasion cases, particularly, a defendant is entitled to more than the mere naked statement of alleged deficiencies, and errors in a filed return. This is especially so in cases

where alleged deficiencies are intended to be established by circumstantial reconstruction under complicated accounting methods.

In the case at bar, the first notice that the petitioner received of the circumstantial methods to be relied upon by the prosecutors was in the opening statement of the prosecutor (R. 18), when it was stated that the Government would rely upon the "bank deposit" method and the "net worth" method.

Thereafter during the trial, the petitioner, for the first time, was confronted with Government Exhibit 103, which was a detailed accounting sheet setting forth the Government's expert witness' accounting reconstruction of income under the bank deposit method. At this point, defense counsel requested inspection of any additional exhibits intended to be used to support the bank deposit method or the alternative net worth method, and this request was denied (R. 490-492). The following week of the trial the same witness produced Government's Exhibit 108, which was a schedule showing computation of the reconstructed income of the petitioner by net worth and expenditure method. The next day the Government rested its case (R. 634, 635).

The distress of the petitioner's trial counsel is demonstrated at pages 564 and 565 of the Record. The Record at pages 564, 565 and 771 indicates the temper and inclination of the trial Court with regard to indulgence of any request by the petitioner for adjournment, recess or continuance for the purpose of studying these complicated exhibits, and their submission for adequate examination by accounting assistance.

It is respectfully submitted that the Court of Appeals erred in holding that the Record does not show any pre-

judice to the petitioner, and it is submitted that the decision of the Court of Appeals will stand as authority for regular and automatic denial of requests for particulars which should have been granted, if the decision is not corrected by action of this Court.

The language in *Singer* v. *United States,* 58 F. 2d 74, 76, indicates the desirability of a bill of particulars in a case such as this and that decision is in conflict with the decision of the Court of Appeals in the case at bar. The opinion of the District Court in Wisconsin rendered in *United States* v. *Brodson,* 136 F. Supp. 158, 165, demonstrates the widespread common knowledge that adequate defense cannot be made in income tax evasion cases if all information concerning the methods used by the Government in reconstructing alleged unreported income is denied to the defendant, and adequate opportunity to prepare rebuttal with accounting assistance is precluded. The action of the District Court, and the opinion of the Court of Appeals are not in harmony with the spirit and sense of the opinion of this Court in *Holland* v. *United States,* 348 U.S. 121.

The Court of Appeals has stated in its opinion that the petitioner's request for particulars, in substance, constituted a request for a statement of a theory of law. The petitioner contends that this is not correct and that his motion for bill of particulars actually sought disclosure of the factoral method of accounting relied upon, and details of certain factors involved therein.

III.

Exhibit 103 (R. 449) and Exhibit 108 (R. 526), over objections, were introduced by the Government through the testimony of Agent Schreiber. These exhibits respectively are charts or schedules of figures purporting to

demonstrate the bank deposit theory and the net worth and expenditure theory of the prosecution.

These were submitted to the Jury, (in fact, twelve individual copies were distributed for the Jury's use). (R. 450, 526). No instruction concerning their weight or purpose or manner of consideration, was given to the Jury. It was the obligation of the trial Court to instruct the Jury concerning these documents and their purpose and weight. *Screws* v. *United States,* 325 U.S. 91, 107.

In the recent Holland decision, *Holland* v. *United States,* 348 U.S. 121 at pages 127 and 128, the Supreme Court said,

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

IV.

Vern Balldridge, an officer of the Gary National Bank and formerly City Controller of Gary, testified that he knew the defendant for 10 or 12 years and that defendant's reputation in the community in which he lived for honesty, integrity, truthfulness and veracity was good (R. 659). On cross-examination by the Prosecutor he testified that the defendant's reputation for being a law abiding citizen was good (R. 663).

Edward J. Burns, a licensed Funeral Director of Gary, Indiana, for 27 years, Chairman of the March of Dimes Fund Drive, and former Chairman of Red Cross Fund Drive, and Chairman of O.P.A. for 5 years, all in Gary,

testified he knew the defendant for 15 years, and that defendant's reputation in Gary for honesty, integrity, truthfulness and veracity, and as a law abiding citizen was good (R. 665-667).

William Isham, an Attorney, licensed in Indiana, since 1922, and President of the Indiana State Bar Association, and formerly a member of the Board of Law Examiners, testified that he had known the defendant since 1945, and that defendant's reputation for honesty, integrity, truth, veracity and as a law abiding citizen was good (R. 744, 745).

The Court's instructions on this subject numbered 85 and 86 appear at pages 920 and 921 of the record.

Both instructions use the word "character" rather than reputation, which is erroneous, and misleading, because the defendant, of course, was not proving his good *character* by the witnesses, but rather his good reputation.

This is expressly stated in *Michelson* v. *United States*, 335 U.S. 469, 477, where it is stated:

> "When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation.'"

The instruction tendered by the defendant on this subject (R. 932), was refused by the trial Judge (R. 839). This was a proper instruction and its refusal was prejudicial error. *United States* v. *Donnelly*, 179 F. 2d 227, 233.

Instruction 86, (R. 920, 921) imposed on the Jury the burden of determining whether the defendant was a per-

son of "*good character*", rather than whether he bore a *good reputation* in the matters of truth and veracity, honesty and integrity and for being law abiding, among those who knew him in his community. It put upon the defendant the burden of proving he was *good,* rather than permitting the generation of reasonable doubt if the Jury found he had proved a *good reputation* among others in the respects testified about.

The statement in the instruction that "previous *good character* if shown, cannot justify, excuse, palliate or mitigate the offense, and *you cannot acquit him merely because* you may believe *he had been a person of good repute,*" is so overwhelmingly argumentative against proper consideration of the issue as to destroy any beneficial effect of the evidence.

In *United States* v. *Semeniuk*, 193 F. 2d 508 at pages 509 and 510, the Court of Appeals below said:

> "Certainly the latter portion of the charge if standing alone is erroneous. That admonition to the jury makes the use of good character evidence meaningless. It would be an empty gesture if it could not be considered by the jury and utilized in a proper case for the purpose of acquittal. The government argues, however, that the two portions of the charge when read together are in no way repugnant or conflicting. We cannot so read them. In the first portion, the jury was properly instructed relative to character testimony and was told that evidence of such 'may be sufficient to create in your minds a reasonable doubt as to the guilt of the defendant' but, subsequently, that such testimony 'should not be used by you as an excuse to acquit him in the case.' *But such evidence could be used as an excuse (we think 'reason' is a better word) for a verdict favorable to the defendant.* Certainly, if it raised a reasonable doubt of guilt it was sufficient and *the defendant was entitled to have that made clear to the jury.*" (Emphasis supplied)

"We see no point in citing or discussing the numerous cases called to our attention wherein instructions on character evidence have been considered and discussed. We have examined these cases and none of them support the giving of a charge such as here complained of. In the recent case of *United States* v. *Wicoff*, 7 Cir., 187 F. 2d 886, on page 890 this court, in referring to character evidence, stated: 'Such evidence may in itself be sufficient to create in the minds of the jury a reasonable doubt of the guilt of the defendant.'

"This is the universal rule, so far as we are aware, and it certainly is the rule in this Circuit.

"That the instruction as given was erroneous is hardly open to question. And it is reasonable to think that it was calculated to mislead the jury into ignoring defendant's evidence of good character. We think it was, or at any rate might have been prejudicial to the defendant, particularly in view of the fact that knowledge, the gist of the offense, could only be inferred from facts and circumstances in proof. As previously stated, the evidence on this essential element of the case, when viewed most favorably to the government, was close and the erroneous statement contained in the court's charge might well have produced an effect adverse to the defendant.

"The judgment is reversed and the cause remanded for a new trial."

In *United States* v. *Donnelly*, 179 F. 2d 227 at 233, the Court of Appeals below said:

"We think the instruction formally requested by the defendant should have been given. The outcome of the case depended largely upon the jury's appraisal of the credibility of Hendrixson and of the defendant. Under quite similar circumstances in *Snitkin* v. *United States*, 265 F. 489, this court held the failure to give the instruction here requested was reversible

error. See also: *Miller et al.* v. *United States,* 10 Cir., 120 F. 2d 968. In *Edgington* v. *United States,* 164 U.S. 361, at page 366, 17 S. Ct. 72, at page 73, 41 L. Ed. 467, the court said:

> 'Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing.' "

Other decisions of the Court of Appeals below in support of defendant's contention are *United States* v. *Wicoff,* 187 F. 2d 886, 890; and *Snitkin* v. *United States,* 265 F. 489. These cases and *Edgington* v. *United States,* 164 U.S. 361, all hold that proper instruction on this point is especially necessary where the element of fraudulent intent is involved.

The argumentative admonition that *mere* evidence of good reputation could not justify or excuse acquittal, in itself, was prejudicial and reversible error. The veracity of the defendant as a witness as opposed to Government witnesses was a crucial issue in this case, and of course fraudulent intent and dishonesty were elements necessary of proof.

V.

Throughout the trial, the Prosecutor persistently sought to introduce derogatory and irrelevant prejudicial matter. In closing argument some of these items were dwelt upon at length and with vehemence.

The business of the defendant was gambling. However incidentally harmful this may have been, there was no occasion or justification for the repeated efforts to place before the Jury implications of corruption of officials, violation of War Price regulations, friendship with enforcement officers, and other immaterial matters, *none proved by the evidence,* and unjustified argument of these implications, in an inflammatory manner. The defendant was a resident of Gary, Indiana, and under the law was tried by Jury at Indianapolis, in another Judicial District. To emphasize this could only be an appeal to local prejudice and possible antagonism against a non-resident of the community where the prosecution took place.

a. The witness Slay testified as a Government witness that he had prepared records and tax returns for the defendant and enterprises with which he was connected, from data submitted by defendant and associates (R. 499). Slay, during the time in question, was employed by the Bureau of Internal Revenue, as assistant division chief of the Gary office (R. 498).

In the course of direct examination of his own witness, the Prosecutor asked Slay if he was suspended from Government employment "effective July 16, 1951". Objection thereto was overruled (R. 502).

The Prosecutor then asked if the suspension was in connection with activities with Doyle, the defendant, or his activities. Objection was sustained (R. 502). Page 512 of the record, however, shows the Prosecutor's dissatisfaction with this ruling. He again asked Slay to state when he was suspended by the Government, and then asked, "What reason, if any, did the Bureau give for suspending you?" Objection to this obviously improper question was sustained. It is submitted that this question was asked

y for the calculated purpose of arousing conjecture the Jury on this point, to the defendant's prejudice.

At the conclusion of the direct testimony of Agent reiber, the trial judge interposed this question:

"The Court: The Court has one question before cross examination. Mr. Witness, in search of the Defendant's books and records and checks here, did you find any record of payments to the witness Mr. Slay who kept the books of the Defendant that is in evidence here?

The Witness: No, Sir, no record whatever.

The Court: And any record of payments from the partnerships in evidence here.

The Witness: No, Sir." (R. 564).

his act of advocacy by the Court, coming after com- ion of the Government's submission of its evidence the figures it considered appropriate to its theory of of, could only increase the Jury's curiosity on this levant matter, and emphasizes the probable effect on Jury.

hese matters were then argued to the Jury by Mr. itcomb, Assistant United States Attorney as follows 860):

"Another element, you will be instructed in the same instruction that an affirmative willful intent may be inferred from the nature of the book. Now these books were prepared by Mr. Slay. You know who Mr. Slay was—a fellow with a fine career ahead of him, Assistant Division Collector up in Gary, Assistant Chief of Collections—and he was corrupted by this outfit that he got connected with. He had a job that paid a fine salary and had a future—a good future—in Government service; and you saw him sit there on the stand and tell you how he would meet these people down on the street, down at the bus

station, down at 5th and Broadway, in their car somewhere, and get the records from them, and prepare the books from them; but the records he got from them were sheets of paper prepared by Mr. Crawford for that purpose, and the only purpose of these records was to have something to compare with the 1040's, the partnership returns, which you have seen. These don't prove a thing. There is Mr. Slay on all of these returns. Now, Slay was Doyle's man. On all of these partnerships Slay prepared all of the returns. This is Slay's handwriting on all of these books, and Slay just got dismissed from service, out of a job. He was corrupt, just as many things become corrupt when they are associated with this sort of an operation—law enforcement officers, political officers and juvenile delinquency, all tied in together."

b. The evidence showed purchase by defendant of several automobiles in the years in question. This was treated in argument to the Jury, by Mr. Brown, United States Attorney, as follows:

> "He bought a Lincoln in '46 and remember how hard cars were to get; and a Cadillac in '47. Remember how hard it was to get the cars in those days? Took a little under-the-table dealings, if my memory serves me correctly. I didn't have one." (R. 885).

This unjustifiable argument had the calculated intent to arouse the envy and prejudice of the Jury against the more fortunate; and the purpose of implying criminal under-the-table violations of Emergency price and quota regulations, with no basis whatsoever in the evidence.

c. The Prosecutor by repetitious cross-examination established that the defendant was uncertain of the time during which Blaz Lucas was Deputy Prosecutor in Lake County (R. 786-788).

Mr. Brown's argument to the Jury on this follows:

> "Now, we come to Blaz Lucas. You remember the Defendant on Blaz Lucas. Well, you know it would be hard for a normal fellow to think back and remember that many years back; but, gentlemen, when you are in the kind of business the Defendant was in, you know who the prosecutor is and who the deputy prosecutor is. If you are running a farm, you don't care; and it is interesting to observe he could not be sure about who this assistant prosecutor was. He was sure about the term of office of the sheriff and the chief of police; he was not sure about Blaz. Now Blaz he used as a nominee in connection with that corporation and he just didn't want to be saying anything. By George, I know Blaz Lucas, his attorney, was the fellow-chief deputy prosecutor—when those locations for the Novelty machines were increasing. I am talking about these things to give you a background picture, because in the 103 and 108 we are just charging him with a percentage in regard to the Novelty and News Company." (R. 884-885).

d. Immediately thereafter the Prosecutor said to the Jury:

> "Now, the Defense had one good witness, in my opinion, and that was the funeral director; and even though he said the Defendant was a law-abiding citizen, when asked by counsel, he said, 'They operate a lot different in Gary than down here.'" (R. 885).

These obviously inflammatory appeals to prejudice against the defendant were calculated to induce the Jury to regard the defendant as a corrupter of Lake County, Indiana, morals and to consider him as a bad man from an alien community of wrong ideals. It was a purposeful diversion of the Jury's interest from the merits of the case.

Nowhere in the record (R. 665-7) is the quotation credited to Mr. Burns, the funeral director, by the Prose-

cutor. The reckless creation of this "quotation" (R. 885) was a wilful distortion of evidence for the obvious purpose of inciting local prejudice of the Jury against the defendant, a resident of Gary, on trial in another judicial district.

e. The Prosecutor's persistent efforts to inject irrelevant prejudicial matters into the record cannot be overlooked. This was done by asking questions, which were so phrased as to state the prejudicial matters in the presence of the Jury, when it was obvious that some would bring forth objections to which they were subject. The mere sustaining of objections on these occasions, with no warning to desist, reprimand, or caution and instruction to the Jury did not cure the irreparable damage to the defendant.

The bases for arousing prejudicial conjecture on these matters by the Jury, were established, and no substantial effort was made to erase them from the Jury's minds, if indeed, that could be done. The following are instances of this conduct:

1. There is no proof in the record of any payments by the defendant or any other person to any law enforcement officials. This matter did not become an issue in the case, in any fashion other than by the Prosecutor's calculated innuendo. In the course of direct examination of Agent Schreiber, the Prosecutor asked the following question:

> "Q. In your examination of the records turned over to you by the defendant, did they disclose any payments that were made to the city police, County sheriff, or any other law enforcement or public officials?"

This question brought forth an objection by defendant's counsel to which the Prosecutor replied, by argu-

ment. The Court sustained the objection on the ground that the question was leading. (R. 412-413).

In the cross-examination of William H. Crawford, a witness for the defendant, who testified after the Government had completed presentation of all of its evidence, *without proving any such payments,* the Prosecutor asked,

> "Q. (By Mr. Brown) Did you make any political contributions in connection with the operation of the Novelty Company?"
> "A. No, Sir."
> "Q. (By Mr. Brown) Make any payoffs to public officials?"
> "A. No, Sir."
> "Q. Make any payoffs to law enforcement officials?"
> "A. No, Sir." (R. 823).

The argument by Mr. Whitcomb at page 860 of the Record, dwelt upon the corruption of law enforcement officers, political officers and juvenile delinquency. It is submitted that Mr. Brown's argument concerning Blaz Lucas, at page 885 of the Record, was intended to imply corruption by bribery of a public officer.

All of this charged, without any support in the Record of evidence, that the defendant was guilty of another collateral crime. It could only be intended prejudice to a fair consideration of the defendant's trial upon the offenses charged in the two counts of the indictment.

2. At page 780 of the Record, in cross-examination of the defendant, John J. Doyle, the Prosecutor asked,

> "Q. Now, did you ever work as a miss-out man in a crap game?"
> "A. No, Sir, I did not."
> "Q. You were never so employed at any time in your life?"
> "A. No."

This question, without any foundation, and without any explanation in the Record, invited speculation by the Jury as to the character of such a sinister sounding employment, and as to the reason for the Prosecutor's question.

At page 803 of the Record, the Prosecutor was shown to have asked the following question of the defendant on cross-examination,

> "Q. Incidentally, when were were talking about your payment of money to Sonny Sheets, do you know whether or not in the late Twenties, Sheets was operating a gambling casino at Cicero or not?"

Objection to this question was sustained, but it is submitted that the obvious attempt to link the defendant by knowledge, with some irrelevant activity of another person 25 years before trial, was for the purpose of arousing prejudicial conjecture and speculation by the jury on a matter not related to the charges in the indictment.

3. In the examination of Mrs. Virginia O'Donnell (R. 248-258), who testified concerning gifts to her by the defendant and his wife during the years in question, the Prosecutor asked whether her former husband, Larry Finerty, had died from natural causes (R. 255). Objection to this question was sustained. It is obvious that the Prosecutor did not anticipate an affirmative answer to this question and was hopeful of introducing to the Jury possible evidence that Mr. Finerty had died as the victim of violence. Possible knowledge of the events connected with the death of Mr. Finerty, on the part of members of the Jury, would, of course, be revived and refreshed by this question.

Of course, this matter had no relevancy to the defendant or to the charges on trial, and it is submitted that

the question was asked for the purpose of arousing prejudicial conjecture and speculation by the Jury.

All of this conduct is subject to as vivid a description as that given by the Third Circuit Court of Appeals to the prosecutor's activities in *United States* v. *American Die and Instrument Works,* 213 F. 2d 731. This decision reversed an income tax conviction which it held to be supported by substantial evidence. The Fifth Circuit Court of Appeals in *Steele* v. *United States,* 222 F. 2nd 628 at 631 has also reversed for incorrect and unfair argument even though not objected to, because of the trial court's responsibility to admonish for such conduct, of his own motion.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11528. OCTOBER TERM, 1955, APRIL SESSION, 1956.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN J. DOYLE,
Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

May 23, 1956.

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* On August 30, 1954, a grand jury returned an indictment against defendant in two counts, the first of which charged defendant with having willfully attempted to defeat and evade a large part of income tax due and owing by him and his wife for the year 1947 by filing a joint return for that year showing a tax liability of $38,770.01, whereas, it was averred, the defendant knew that the amount due was $59,812.73, more or less, all in violation of the Internal Revenue Code, Title 26, U. S. C. § 145 (b), and the second of which charged the same offense for the year 1948, alleging that, whereas the tax return showed due $58,317.24, defendant knew that the true amount was $76,410.86, more or less. After a trial ex-

tending from January 11 to January 29, 1955, the jury returned a verdict of guilty upon each count, and defendant was sentenced to a term of 2 years and fined $10,000 on the first count, and to a term of 2 years on the second count, to be served concurrently with the sentence on Count I.

On appeal defendant asserts some 18 contested issues, which, in its brief, he argues under contentions as follows: (1) that the use of the bank deposit analysis employed by the Government in reconstructing defendant's income was erroneous; (2) that the evidence was insufficient to warrant conviction, since no likely source of defendant's increase under the net worth theory was shown; (3) that the proof did not establish a firm starting point at the close of 1946 or at any other time; (4) that the Government failed to negative all possibilities that the cash included in its estimates had a source other than as taxable income; (5) that exhibits 103 and 108, summaries prepared by the Government accountant, were erroneously admitted in evidence; (6) that defendant was prejudiced by the refusal of a bill of particulars; and (7) that the court erred in refusing certain instructions and in over-ruling objections to certain others submitted to the jury. In the brief, certain of these contentions are merged in argument with others.

The facts most favorable to the Government, which the jury by its verdict must have interpreted in favor of the Government, are somewhat complicated, but are essentially as follows: Defendant has lived in Gary, Indiana, since 1936. There, at first, he continued his former occupation of handling concessions such as games of chance at picnics and other public gatherings, for some five years, during which time he was convicted of gambling. In 1943 he started in a small way to make books on horse races. As he himself stated, he had nothing in the way of capital "to speak of" prior to 1945. He had no tax liability prior to 1941, an income of $3100 in 1941, $2350 in 1942, $7500 in 1943, and $7522 in 1944. In 1944, one Ellis became a partner in this business. In 1943, defendant purchased Series "E" bonds in the amount of $75.00, and in 1944 in the amount of $125.00. His savings account at the Gary Na-

tional Bank in 1944 showed total deposits in 1944 of $500. He had a safety deposit box at the bank from and after April, 1944. On December 31, 1944, he had a net worth of approximately $1,000.

On August 1, 1945, with certain other persons, he formed the Calumet News partnership, the members of which varied from time to time. In 1945 he placed 8 or 10 coin machines, and during the year purchased two $50 bonds, six $500 bonds and two $1,000 bonds, and opened a checking account at Gary National Bank, with some $2600. During the year he gave to Virginia Heckler, a relative, some $1500. He reported in his income tax report a net income of $53,184.72, derived from the two partnerships, and paid a tax of $6,826.78.

January 1, 1946, defendant organized a novelty company partnership with one Crawford as partner. At the same time the News Service was reorganized. During the year he purchased a 1946 Lincoln automobile for $2694.98, loaned Robinson $3000, and made gifts to Virginia Heckler of $5,500. In June of that year, his wife, Frances, leased a safety deposit box at the Gary National Bank. His equity in the three partnerships as of December 31, 1946, aggregated $8,708.37, which represented an increase in his partnership holdings occurring during the years 1945 and 1946. On December 31, 1946 the balance in his checking account at the Gary National Bank was $34,872.54, and that in the savings account $1,516.79. For 1946 defendant reported net income of $110,963.49 from the three activities, the 442 Club, the Novelty Company and the News Company. He paid in that year $54,539.08 on his income taxes for the years 1945 and 1946. The Government contended, and substantial evidence tended to show, that his total net worth on December 31, 1946, was $79,590.68.

All of defendant's receipts were in currency. The three partnerships maintained no banking accounts. His receipts, in cash, from slot machines and racing books, in currency, were placed in his safe, but from time to time he took money thence to a joint deposit box to which he and one Crawford had access. The receipts from all the co-partner-

ships were mixed indiscriminately in the safety deposit box, from which he removed currency from time to time, making deposits in his checking accounts as he needed funds. Crawford's share of the novelty company receipts in 1947 was over $26,000, and in 1948, over $60,000. The slot machines increased from 16 in January to 42 in December, 1947, and, in 1948, from 42 in January to 85 in December.

From January 1, 1947 through June 14, of the same year, the race booking business was conducted through 14 substations, at each of which an employee kept a record of payoffs and divided the profits in pursuance of an agreement with Doyle's company on a 60-40, or 50-50 percentage basis. The business reported a net income of $122,199.05 in 1947. During the 7 months of its operation in 1948 it showed a total of so-called "ins" of $1,248,000. The News Company paid that year a gross income tax of $1,924.

The Government obtained its basic information from many exhibits offered in evidence, including certain summaries made by authorized employees of Doyle. However, the employees never examined any of the underlying records on which the summaries given them were based, merely transcribing the figures in the records in evidence.

Doyle testified that in the years in question his means of livelihood were derived from these three undertakings and that neither he nor his wife or sons had received any gifts or inheritances. He opened a second checking account at the Gary Trust & Savings Bank on November 18, 1947 with a deposit of $18,500.

It was contended, and the evidence justifies the conclusion, that all the records were Doyle's, that he signed the partnership returns and that he turned the documents over to Schreiber, the auditor for the Government. The underlying original records were destroyed by burning, before the indictment was returned; only the summary information was preserved and later delivered to the Government auditor. Schreiber interviewed Doyle on April 25, 1951. Defendant was advised of his constitutional rights and

asked to bring in all books and records, including cancelled checks and bank statements. He complied on April 26, 1951, and advised the Government agents they might keep them as long as they desired. When the auditors commented that the records appeared to be nothing but summaries, he informed them that the underlying documents had been destroyed prior to the investigation.

Schreiber asked Doyle for a net worth statement on at least six occasions, and at different times, in September and October, 1951, told him that he, Schreiber, would furnish the Government accounting figures to defendant if defendant would disclose his. Doyle declined to do so. In July, 1952, Schreiber again requested of defendant a year to year net worth statement and a statement concerning his tax liability. Defendant did not object to giving Schreiber an itemized oral statement of living expenses, but said he did not know how much cash he had in the safety deposit boxes at any one time.

Schreiber continued his investigation, analyzed each bank and savings deposit, made an analysis of the cancelled checks, compared them with the debits on the bank ledgers, made a detailed examination of each and every entry in the summaries, compared those records with the tax returns, checked returns with Doyle's so-called partners, canvassed the department stores in Gary, East Chicago and Chicago areas for charge accounts, checked all public records for real estate transactions, mortgages and acquisitions, inventoried the safety deposit boxes, made an examination of Doyle's tax liabilities and of the Jackson Restaurant records, made a detailed check of each and every transaction affecting defendant's financial affairs, and checked with Doyle all financial transactions which came to light during the course of the investigation.

In addition to his other activities, Doyle had an interest in Jackson's Restaurant, with one Paul Jackson, entering into a partnership with him on May 27, 1947, which operated as a night club. The partnership agreement was executed by one O'Donnell and one Jackson. Jackson put in $20,000 and claimed he did not know where O'Donnell

got the other $20,000. In 1947, the restaurant had gross receipts of $68,930, and a net income of $2900, 50% of which was given to O'Donnell. In 1948 Doyle and Jackson contracted for air-conditioning. Doyle gave his personal check for $1,000, and made subsequent payments of $2,000. The property was finally fully paid for in 1948 and conveyed to Doyle and Jackson and their wives. In October, 1948, Doyle suggested to O'Donnell that he take over the latter's interest; O'Donnell complied. Doyle says that the consideration for this was his payment of O'Donnell's income tax of $1659 for 1948. The partnership was succeeded by a corporation with 20 shares of stock, 9 of which went to Doyle, 1 to Mrs. Doyle, 1 to Mrs. Jackson, leaving 9 in Jackson's name. Various other details as to the conduct of the night club were received in evidence, which we deem it unnecessary to discuss.

The foregoing does not include discussion of all of the evidence, oral and documentary, submitted in a somewhat lengthy trial, but it is sufficient, we think, to supply an adequate view of the facts pertinent to the issues presented.

Exhibit 103 was a summary prepared by the Government auditors from the records, bank accounts, savings accounts, and Doyle's own statements. As a result, after showing all deposits in the Gary National Bank checking account and two savings accounts, and in the Gary Trust & Savings Bank checking account and one savings account, the total bank deposits for the year, making all deductions called for by Doyle, the auditor found a net income for the year 1947, of $97,503.30, resulting in an additional net income over that reported of $27,032.28. For 1948, the auditor found a net income of $150,032.17. The reported net income having been $119,300.05, there resulted an additional net income of $30,732.12.

Defendant complains that the exhibit should not have been received. But the existence of unreported income may be proved by any practical method available in the circumstances of the particular situation. *Davis* v. *United States,* 226 F. 2d 331, 336, cert. denied 350 U. S. 965

(CA-6). The Government is free to use all proper evidence available. *Holland* v. *United States,* 348 U. S. 121, at 132. Of course, proof under the bank deposit theory is circumstantial in nature, but we know of no reason why such deposits may not be considered in determining income, when there is no evidence that they represent anything other than income. In other words, such evidence will support an inference that the deposits are taxable. It may be that they are regularly and periodically made; it may be that they are made at irregular intervals; it may be that they are made from currency removed from safe deposit boxes, but, as long as the taxpayer is conducting a cash business and the deposit books show substantial currency deposits and there is proof of removals from the safety deposit boxes into deposits, the circumstances are proper to be considered in determining whether the deposits represent current taxable receipts, if a thorough investigating analysis of the deposits is made, as was the case here and as is required generally, *Buttermore* v. *United States,* 180 F. 2d 853 (CA-6). The question as to what facts and circumstances will justify a proper inference of a deposit of taxable income, becomes a question of fact for the jury under the supervision of the trial court. That such evidence may result from analysis of bank accounts and cancelled checks is entirely permissible. *United States* v. *Bender,* 218 F. 2d 869 (CA-7). There having been no evidence of loans or gifts to defendant or inheritance by him, there is no reason why the deposits correlated by the auditor should not have been submitted to the jury.

The Government supplemented its proof under the bank deposit theory, and demonstrated in addition, from its point of view, a deficiency by a computation made upon the net worth theory as shown in Exhibit 108. Defendant insists also that there was no proper basis for this computation.

The Government may prove its case, of course, by circumstantial evidence from which the jury may infer justifiable facts. It is not required to prove a negative or to refute all possible speculation as to source of funds. *Campodonico* v. *United States,* 222 F. 2d 310, cert. denied 350 U. S. 831 (CA-9). Consequently, it may employ the net

worth method. Obviously, it is not necessary to prove the exact amount of deficiency averred in the indictment. It is sufficient to prove that a substantial amount of tax liability has been willfully averted. *Sasser* v. *United States,* 208 F. 2d 535 (CA-5).

Here, the Government started out with defendant's statement that he had nothing to speak of prior to 1945 and no inheritance or gifts in his financial history, as he disclosed it to the Government auditors. Prior returns of the taxpayer are sufficient to establish a firm starting point. *Holland* v. *United States,* 348 U. S. 121; *United States* v. *Skidmore,* 123 F. 2d 604, cert. denied 315 U. S. 800 (CA-7). The admissions of defendant resulting from his failure to include in his prior tax returns more than was reported constitute evidence that he did not have an income in excess of the amounts for which he was required by law to file a return. *Warzower* v. *United States,* 312 U. S. 342; *Smith* v. *United States,* 348 U. S. 147, 157-158; *Leeby* v. *United States,* 192 F. 2d 331 (CA-8).

There was extended persuasive evidence that defendant had a net worth, on December 31, 1944, of $1,019. Starting on this basis, for the period from 1920 to 1946, the evidence tended to show that his net worth on December 31, 1946 was $79,629.54. Government's exhibit 108 showed a net worth at that time of $79,590.68. Defendant would not say exactly how much property he had at any time. On the bank deposit method the calculation showed net income omitted in 1947 and 1948 of $57,764.40. Calculated on the net worth method, the amount was $58,361.38. In both exhibits defendant was given credit for $24,758 cash on hand on December 31, 1946. Doyle's own figures tended to corroborate these ultimate facts. Furthermore, his voluntary statements and his employment records belied any possibility that the increase in net worth came from any preexistent wealth.

The amount credited to him for expenditures for living expenses, in order to arrive at a fair basis for calculating how much was left for addition to capital, was arrived at largely from his own statements as to what those costs were. His own testimony was in the record and the basis

upon which the living expenses were computed was fully explained to the jury, which made its decision approving the Government's figures.

Under the authorities, the admission of exhibits 103 and 108 was not prejudicial error; the admission of each, following a legitimate theory or method of determining unreported income was within the limitations upon the rule. *Holland* v. *United States,* 348 U. S. 121. The sources from which the figures were obtained and the calculations prepared were in evidence. The audits were prepared by a certified public accountant from the documentary and oral evidence. Defendant enjoyed ample opportunity to cross-examine the auditor fully as to all of these details and as to the evidentiary sources when they came. It is significant, we think, that the result was substantially the same, whether the auditor followed the bank deposit method or that of net worth.

Defendant complains that his motion for a bill of particulars prior to trial was improperly denied. Ordinarily, of course, it is safe practice for the court, in the exercise of its discretion, to permit a demand for a bill of particulars. However, a proper bill of particulars does not require inclusion of a statement of the theory of law upon which the Government expects to proceed, *United States* v. *Klein,* 124 F. Supp. 476, but is to be confined to facts relied upon, and supplied only where there is no opportunity afforded for the defendant to prepare to meet the charges of the indictment without further information as to such particulars. The allowance or denial of the motion is largely a matter of discretion and denial will not be treated as prejudicial error or abuse of discretion where there is no proof of prejudice.

From the evidence here, it is apparent that Doyle, in his continued conversations with the auditors and with the agents of the Government, prior to his indictment, had been fully advised as to what the Government was contending as to his unreported income. The records, such as they were, were in his possession and control and he must have known that the Government was relying upon those records and his bank accounts, as indeed it did. Further-

more, during the course of the trial, lasting from January 11 to January 29, there was not the slightest suggestion by counsel for defendant at any time that any of the proofs submitted by the Government resulted in surprise to the defendant or in prejudice to his right to a fair trial. When the auditors identified the exhibits, there was no surprise expressed as to exhibits 103 and 108, and no application made for adjournment, recess or continuance, no claim that defendant needed more time in order to check and digest the details of the exhibits. In other words, whatever the desirability of the allowance of the motion originally, the proof indicates not the slightest surprise, not the slightest prejudice. Consequently, we cannot say there was error in denial of the motion.

Defendant asserts error upon the part of the trial court in giving and refusing instructions. Upon examination of the record we find that defendant's offered instructions which were not given were fully covered by the court in instructions which it gave. Of course, it is not necessary to charge upon any subject in the exact words of an offered instruction which is denied, when it appears from the charge as a whole that the subject matter has been fully covered. The words "character" and "reputation" seem to have been indiscriminately used by the parties and by the court at various times, but from the consideration of the charge as a whole, we believe it was made clear to the jury that what was in issue was defendant's reputation rather than his character. Defendant's cited authority differs from this case as it did from *United States* v. *Echeles*, 222 F. 2d 144, 160, cert. denied 350 U. S. 828 (CA-7), where we said: "The instructions given in the two cases are not the same; they are significantly different. Here, the jury was told, in substance, that if, after they considered all of the evidence, including evidence of good character or good reputation, they believed beyond a reasonable doubt that the defendants were guilty, then they should not use good reputation as an excuse to acquit the defendants. In the *Semeniuk* case, the jury was told that the mere fact that a defendant may have had a good reputation prior to the time of the trial should not be used by the jury as an excuse to acquit him."

Certain other instructions were attacked as to which no objection was made in the trial court. In certain other instances defendant's counsel said they had no objection. Obviously, no question is presented for review where there are no objections to instructions, unless the court is convinced that prejudicial error has occurred. *United States* v. *DeMarie*, 226 F. 2d 783, cert. denied 350 U. S. 966 (CA-7). Notwithstanding this governing rule, we have examined all of the objections with reference to instructions now raised, whether objections were preserved in the trial court or not, and, without unduly extending this opinion, are content to dispose of defendant's arguments with the statement that the charge as a whole explained everything fairly and impartially and in a manner which made it impossible for the jury to misinterpret its content. We think defendant's contentions in this respect are without merit.

Defendant further complains of the Government's argument to the jury. But again the record discloses that no objection was made to the argument and in our opinion there is nothing therein of prejudicial character. As we said in *Malone* v. *United States*, 94 F. 2d 281, at 288, cert. denied 304 U. S. 562 (CA-7): "* * * the argument, taken as a whole, though vigorous and forcible, was as fair to the defendant as might reasonably be expected under the circumstances. Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to make reply to that made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper. Defendant's trial counsel evidently did not regard the argument as vicious or unfair as objection was made to one statement only, and that of minor importance."

Further complaint is made concerning certain rulings on the admission and exclusion of testimony. We find nothing of a prejudicial nature therein.

We have made an extended examination of the record. We have not included many of the voluminous details appearing therein, but we find therein competent pertinent evidence in support of the indictment charge which the

jury had a right to believe, and which it obviously believed was sufficient to sustain the verdict.

The judgment is

AFFIRMED.

FINNEGAN, *Circuit Judge,* Concurring. I join in the Court's opinion and agree that the judgment appealed should be affirmed. There is absent in this record any abuse of discretion on the trial judge's part in refusing the requested particulars, as Judge Lindley's opinion makes plain. Reviewing denials of motions for a bill of particulars necessitates an examination of the facts and circumstances surrounding each case. Defense requests for particulars, under Rule 7(f), Federal Rules of Criminal Procedure, 18 U. S. C. (1952 ed), are now apparently geared to the increasing pace of net worth and bank deposit methods of prosecuting criminal cases involving alleged violation of the internal revenue laws. My separate statement arises from a frank recognition of the peculiar problems confronting counsel and client defending against cases erected on either one or both of those theories. When he delivered the Court's opinion in *Holland* v. *United States,* 348 U. S. 121, 129 (1954), Mr. Justice Clark cautioned that: "Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute."

Averting surprise to the defense, in criminal cases, is a chief aim of a bill of particulars by furnishing the defendant with particulars he is enabled to prepare his defense and meet the accusations embodied in the indictment under which he is tried. It is for this reason that the prosecution is delimited to the perimeter staked out by the particulars supplied in response to an order allowing the defense motion. *United States* v. *Neff,* 212 F. 2d 297, 309 (3rd Cir. 1954).

Attached to Doyle's motion for a bill of particulars is an affidavit of his certified public accountant stating that he ". . . examined the books and records of the defendant John J. Doyle for the years 1947 and 1948; and the income

disclosed by said books and records is in agreement with said defendant's copies of his income tax returns as filed for said years." Another passage from the *Holland* case (348 U. S. 121, 131-132) has significance here:

> "The net worth technique as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. Petitioner's accounting system was appropriate for their business purposes; and admittedly the Government did not detect any specific false entries therein. Nevertheless, if we believe the evidence as the jury did, we must conclude that defendant's books were more consistent than truthful, and that many items of income had disappeared before they had even reached the recording stage."

Insisting that his books and records coincide with the tax returns filed, and on which the indictment is based, Doyle asked that the government supply him with "the method by which 'joint net income' " was determined; the amounts and items of income, deductions, and credits, and for "the method used in reconstructing" income for the calendar years involved. Yet the indictment charged Doyle with an offense described in statutory language. The short of it is that Doyle bottoms his assertion of discretion abused on the district judge's refusal to order a revelation of the *"theory"* of prosecution. There is a difference between specifying the charge made against an accused person and the theory which is pursued by the government in establishing its case at a trial on the merits. From this record it appears that Doyle was in possession of the means of ascertaining the various items of income and deduction that he wanted the government to disclose. *United States* v. *Skidmore,* 123 F. 2d 604, 607 (7th Cir. 1941). My remarks and concurrence are expressly limited to this appeal, for the problem of a bill of particulars is a sensitive area in federal criminal prosecutions of the type involved here, and I would prefer to leave latitude available for future reviews of district judge's discretion.

A true Copy:

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11575. October Term 1955, April Session 1956.

The United States of America,
Plaintiff-Appellee,
vs.
Sam Achilli,
Defendant-Appellant.

Upon Petition for Rehearing

July 31, 1956.

Before Major, Lindley and Swaim, *Circuit Judges.*

Lindley, *Circuit Judge.* Upon defendant's conviction on three counts of an indictment charging attempts to evade the payment of income taxes for the taxable years 1946, 1947 and 1948 by filing, or causing to be filed, false and fraudulent income tax returns in violation of 26 U.S.C. § 145 (b), (I.R.C. 1939), he was sentenced, on each count, to serve two years in prison, the sentences to run concurrently.

On appeal, we reversed the conviction as to Count I and affirmed as to Counts II and III. Defendant's petition for a rehearing is based, *inter alia,* upon arguments addressed to the sufficiency of the evidence to prove his guilt upon the net worth theory of proof. We think nothing is added thereby to the points raised and argued on appeal. We adhere to our judgment affirming the conviction as to the two counts.

A rather troublesome question raised by the petition is one upon which defendant did not rely either in the trial

court or before us on appeal, namely, that the sentence is invalid. As we have previously stated, the indictment charged three separate attempts to evade income taxes by filing false and fraudulent returns, a charge which has been repeatedly held to allege the felony defined in Section 145 (b).[1] See *e.g. United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Raub*, 177 F. 2d 312 (CA-7); *United States* v. *Rosenblum*, 176 F. 2d 321, cert. denied 338 U.S. 893 (CA-7). Defendant now contends, for the first time, that the charge contains the elements of the misdemeanor defined in 26 U.S.C. § 3616 (a), (I.R.C. 1939)[2], that those elements and those of the felony are in all respects identical and that, therefore, it was error for the trial court to impose a sentence greater than that prescribed for the misdemeanor by § 3616 (a).

The government admits that both § 145 (b) and § 3616 (a) apply to income tax returns and cover identical ground. It contends, however, that the government has the authority to elect under which statute it will proceed, or, alternatively, that the subsequent enactment, § 145 (b), repeals § 3616 (a) by implication.

Before reaching the merits of defendant's petition, we must determine whether the question can properly be raised at this late date. We think that it cannot. We say this advisedly, and do not purport to determine whether,

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[1] "(b) * * *. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[2] "Whenever any person

"(a) FALSE RETURNS. Delivers or discloses to the collector * * * any false or fraudulent list, return, * * *, with intent to defeat or evade the * * * assessment to be made; * * *

'He shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.'

were the question an open one, we would construe the conceded overlapping of the two statutes as a question of plain error "affecting substantial rights" and therefore noticeable "although * * * not brought to the attention of the trial court." Fed. Rules Crim. Proc. 52 (b). We think that a determination that the question does not present such error is manifest in the recent pronouncements by the Supreme Court in *Berra* v. *United States*, 351 U.S. 131, which, at least, imply that the validity of a sentence under § 145 (b) must be challenged by an appropriate proceeding in the trial court.

The indictment in Berra was in all material respects identical to that before us. At the close of all the evidence Berra requested an instruction "that a verdict of guilty of the 'lesser crime' under § 3616 (a) would be permissible." 351 U.S. at 132. Although the Court's decision affirming Berra's sentence is restricted to the narrow question whether that requested instruction was properly refused, the Court concluding that the refusal did not constitute error, the intendments of the opinion are much broader. The Court assumed, *arguendo*, that both § 145 (b) and § 3616 (a) applied and "covered the same ground." 351 U.S. at 134. It held, however, that the implication of such overlapping was a question of law for the court which had not been raised in the trial court and that "no such questions are presented here." 351 U.S. at 135.

Mr. Justice Black filed a dissenting opinion, in which Mr. Justice Douglas joined, stating that he would reverse the judgment, or at least remand the case to the district court "for resentencing under the misdemeanor statute, § 3616 (a)." 351 U.S. at 140. The dissent is based upon the postulate that the case presented an issue of plain error affecting substantial rights.

We can only conclude that the majority opinion in Berra inherently impels a determination that the question before us does not reflect plain error. Rule 52 (b) was designed to reach errors of such a substantial nature that they would, if not corrected, result in a manifest miscarriage of justice. *Brotherhood of Carpenters* v. *United States*, 330

U.S. 395; *United States* v. *Vasen*, 222 F. 2d 3, cert. denied 350 U.S. 834 (CA-7). Inasmuch as errors within the comprehension of the provisions of this rule are those of such a nature that they must be corrected to prevent a manifest injustice, it is incumbent upon a reviewing court to notice such error *sua sponte* although the issue presented is not raised on appeal. *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Dressler*, 112 F. 2d 972 (CA-7); *Lash* v. *United States*, 221 F. 2d 237, cert. denied 350 U.S. 826 (CA-1); *Austin* v. *United States*, 208 F. 2d 420 (CA-5); *Simmons* v. *United States*, 206 F. 2d 427 (CA-DC); *United States* v. *Kemble*, 197 F. 2d 316 (CA-3). Cf. *United States* v. *Jonikas*, 187 F. 2d 240, cert. denied 344 U.S. 877 (CA-7).

In the face of this pronounced duty upon federal appellate courts, see *Screws* v. *United States*, *supra*, the Court n Berra took the position that the issue of the implication f the overlapping of §§ 145 (b) and 3616 (a) was not preserved because Berra had presented no proper challenge to the sentence to the trial court. As the dissenting Justices aptly observed, 351 U.S. at 137, the instruction which Berra requested advised the lower court of "petitioner's contention that the offense charged was not a felony but a misdemeanor." If the question was not preserved for review under the circumstances of that case, it certainly cannot be raised on this appeal in which there was no intimation of error below in the imposition of sentence or on appeal until the petition for rehearing was filed.

The petition is denied.

true Copy:

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, May 23, 1956

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. Walter C. Lindley, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11528 vs.

JOHN J. DOYLE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Monday, August 6, 1956

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. Walter C. Lindley, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,
No. 11528 vs.
JOHN J. DOYLE, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

The Petition for rehearing heretofore filed in this cause is denied.

It is further ordered that, on consideration of defendant's motion for leave to file an additional petition for rehearing challenging the validity of the sentence imposed upon him under 26 U.S.C. § 145, (b), (I.R.C. 1939), and the plaintiff's answer thereto, the said motion is denied for the reasons stated in United States v. Achilli, No. 11575, decided July 31, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 386

JOHN J. DOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. 1a–13a) affirming the judgment of the District Court is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 18a) was entered May 23, 1956. A petition for a rehearing and a motion for leave to file an additional petition for rehearing were denied on August 6, 1956. (Pet. 19a.) The petition for a writ of certiorari was filed on September 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court erred in imposing upon petitioner, under Section 145 (b) of the Internal Revenue Code of 1939, a sentence in excess of that which could have been imposed under Section 3616 (a) of the Code; and whether the Court of Appeals erred in refusing to remand the case to the trial court for resentencing under Section 3616 (a).

2. Whether it was an abuse of discretion for the trial court to deny petitioner's motion for a bill of particulars.

3. Whether the trial court committed reversible error in failing to instruct the jury in language requested by petitioner on the use of the Government's summaries of alleged unreported income computed on the net worth and bank deposits methods.

4. Whether the trial court committed reversible error in instructing the jury as to the weight to be given the testimony of character witnesses.

5. Whether the prosecutors' conduct deprived petitioner of a fair trial.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any man-

ner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or

* * * * *

(26 U. S. C. 1952 ed., Sec. 3616 (a).)

Federal Rules of Criminal Procedure:

RULE 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly

the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. *Harmless Error and Plain Error.*

* * * * *

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On August 30, 1954, a two-count indictment was filed against petitioner in the United States District Court for the Southern District of Indiana, charging him with wilful attempts to evade his income taxes for the years 1947 and 1948, in violation of Section 145 (b), Internal Revenue Code of 1939, by filing false and fraudulent income tax returns. The amounts of net income and the taxes due thereon, as reported in the returns and corrected, were alleged to be as follows (R. 2–3):

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947)	$70,471.02	$38,770.01	$97,171.38	$59,812.73
Count II (1948)	119,300.05	58,317.24	145,654.30	76,410.86

On September 23, 1954, petitioner filed a motion for a bill of particulars requesting the method by which income had been determined, deductions and credits allowed, the source or sources of the income, and the method by which income had been reconstructed. (R. 6–7). After oral argument, the motion was denied on October 27, 1954. (R. 10.)

After a jury trial petitioner was found guilty on all counts. On April 15, 1955, the court imposed with respect to Count I a fine of $10,000 and with respect to each count concurrent prison sentences of two years. (R. 952–953.) The Court of Appeals affirmed (Pet. 1a–13a) and denied a petition for rehearing and a motion for leave to file an additional petition for rehearing (Pet. 19a).

The evidence to support the verdict, the sufficiency of which is not challenged, may be summarized as follows:

During the prosecution years petitioner's reported income arose from two bookmaking partnerships and a partnership operating and maintaining slot machines. (R. 26–38.) The Government's case was established by an exhaustive analysis of petitioner's bank deposits and disbursements, corroborated by proof of annual net worth increases and expenditures in excess of his reported income. The results reached by these two methods were within a few hundred dollars of each other with respect to each of the two years, and showed that petitioner had income substantially in the amounts alleged in the indictment. (R. 451–490, 523–565.) Petitioner's defense at the trial was that he had at least $50,000 in cash on hand as of the beginning of the first prosecution year, 1947. (R. 754, 811–812.) The evidence showed that neither petitioner nor any member of his family had ever received any gifts or inheritances; that, between 1920 (when he was first gainfully employed) and 1941, petitioner had paid no income tax and was usually employed as a clerk or salesman; that after a brief period of unemployment in 1943 he became a horse-

race bookmaker on a small scale, branching out in 1945 and 1946 into larger operations; that he reported nominal income for the years 1942–1944 and substantial income for 1945 and 1946; that his visible net worth as of the beginning of 1945 was $1,007.50 and he had "nothing to speak of" prior to 1945 or 1946; and that his visible net worth as of the beginning of 1947 was within $38.86 of the estimated net worth he could have accumulated on the basis of his income tax return filing history. (R. 436, 534, 556, 559, 720, 759–763, 771, 774–775, 776–777, 807.)

ARGUMENT

1. Petitioner's first contention (Pet. 15, 17–18) is that the sentence imposed upon him is illegal in that it exceeds the maximum prescribed by Section 3616 (a) of the Internal Revenue Code of 1939. He argues that the indictment, although purporting to charge offenses under Section 145 (b), the Code provision making income tax evasion a felony (*supra*, pp. 2–3), in fact charged only the misdemeanor proscribed by Section 3616 (a) (*supra*, p. 3). He therefore "seeks to have the validity of the sentence determined by this Court" (Pet. 15) or, in the alternative, to have the case remanded to the District Court in order that he might move to correct his sentence (Pet. 18). The short answer to these arguments is that the point has not been preserved. It was first raised in the Court of Appeals in a motion for leave to file a second petition for rehearing, and that motion was denied. (Pet. 19a.) In *Berra* v. *United States*, 351 U. S. 131, where the defendant had called

Section 3616 (a) to the attention of the trial court by requesting an instruction to the jury, this Court (Justices Black and Douglas dissenting) found it unnecessary to decide whether the sentence was excessive. *A fortiori* the question is not presented by this record, on which it was not raised in the District Court in any manner. *United States* v. *Achilli*, 234 F. 2d 797, 808–810 (C. A. 7th) (Pet. 14a–17a).[1]

2. The contention (Pet. 18–20) that the trial court erred in denying petitioner's motion for a bill of particulars (R. 6–10) rests mainly on the statement (Pet. 19) that "the first notice that the petitioner received of the circumstantial methods to be relied upon by the prosecutors was in the opening statement * * *." We think it is clear that the defense knew long before the trial that the Government would have to rely upon reconstruction of income by circumstantial evidence, i. e., proof of excessive net worth or bank deposits, or both. The petitioner's books were in agreement with the false returns, as he knew. (R. 9.) The partnership books agreed with the partnership returns. (R. 585–586.) The underlying records of the three partnerships were burned by petitioner early in 1951, shortly before the investigation began. (R. 319, 785, 799–800.) In these circumstances it was apparent that the Government could not establish unreported income by direct proof. Moreover, the defense knew in 1951 that the Gov-

[1] We note, however, that the Second Circuit did consider this question in a case in which it was not raised in the trial court. *United States* v. *Moran*, decided August 15, 1956, pending on petition for certiorari, No. 417, this Term.

ernment had prepared a summary of petitioner's net worth (R. 598, 599) and learned long before the trial that a thorough analysis of his banking transactions had been made (R. 415–417, 426, 495, 572). The absence of prejudice is shown by petitioner's failure to move for a continuance at the trial in order to perfect his defense.[2]

Even if petitioner had not been as fully informed of the Government's case as he was, the denial of his motion would not constitute prejudicial error. *Remmer* v. *United States,* 205 F. 2d 277, 281–282 (C. A. 9th), judgment vacated and remanded on other grounds, 347 U. S. 227; *Rose* v. *United States,* 128 F. 2d 622, 624–625 (C. A. 10th), certiorari denied, 317 U. S. 651; *Maxfield* v. *United States,* 152 F. 2d 593, 596 (C. A. 9th); *United States* v. *Mangiaracina,* 10 F. R. D. 415 (W. D. Mo.) and cases cited. There is no conflict between the decision below and the case of *Singer* v. *United States,* 58 F. 2d 74 (C. A. 3d). That case turned on its own peculiar facts (see *Rose* v. *United States, supra,* pp. 624–625) and its authority in the Third Circuit has recently been severely limited by *United States* v. *Caserta,* 199 F. 2d 905, 910 (C. A. 3d).

[2] The defense was simply that petitioner had at least $50,000 cash on hand at the beginning of the prosecution years, which would have been just about enough to account for the unreported income. (*Supra,* pp. 5–6.) If this were true there would be no need for the defense to delve into the details of the Government's reconstruction. The real issue would be the adequacy of the Government's proof that the starting point net worth had been established with reasonable accuracy. Of course it is not the function of a bill of particulars to furnish such details of the Government's evidence.

3. There is plainly no merit in the contention (Pet. 20–21) that the trial court erred in submitting the Government's summaries of unreported income to the jury without proper instructions. The instruction requested by petitioner (R. 939) would have told the jury that even if they were "satisfied with the amount the Government has attempted to establish as the net worth of the defendant, it does not automatically follow that the defendant is guilty * * *" for the Government "still has the burden of proving all the other elements of the offense charged beyond all reasonable doubt." We think the instructions actually given by the court were more favorable to petitioner than the requested instruction. The jury was carefully and fully charged that they were the sole judges of the facts and the weight to be given the testimony and exhibits (R. 918); as to the weight to be given the testimony of expert witnesses (R. 907); as to the nature of the net worth and bank deposits methods of proving income and the pitfalls inherent in those methods (R. 908–910, 911); and as to the crucial importance of the element of wilfulness (R. 911). Moreover, defense counsel stated that he had "no objection to the charge of the Court" except for the failure to give many of the instructions tendered by him. (R. 925, 929–945.)

4. Petitioner's fourth point (Pet. 21–25) is that the trial court committed reversible error in charging the jury as follows (R. 920–921):

> Testimony has been introduced by defendant to show that he was and is a man of good character for honesty, integrity, truth and

veracity and the defendant's being a law-abiding citizen. This is proof admissible not for the purpose of showing that he did not commit the offense or offenses with which he is charged, but to show the improbability that he would commit such an offense and in connection with all the other evidence introduced, should be considered by you in determining the weight to be given defendant's testimony and the probability of his guilt or innocence.

In determining as to the guilt or innocence of the defendant, you should take into account the testimony in relation to his character for honesty, integrity, truth and veracity and the defendant's being a law-abiding citizen; and you should give to such testimony such weight as you deem proper. And if you find that defendant had a good character, then this when considered in connection with other evidence in the case, may alone create a reasonable doubt as to guilt, although without it, the other evidence would be convincing. But if, from all the evidence before you, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, can not justify, excuse, palliate or mitigate the offense, and you can not acquit him merely because you may believe he has been a person of good repute.

Petitioner's main complaint is that the court should have used the word "reputation" rather than "character". We submit that this point, which was expressly waived at the trial (R. 852, 925), is frivolous. Rule 30, Federal Rules of Criminal Procedure. (*Supra,* pp. 3–4.)

5. Petitioner's final contention (Pet. 25–33) is that he was deprived of a fair trial by the prosecutors' introduction of irrelevant and prejudicial matters. The instances cited fall into two categories: (*a*) statements made by the two prosecutors during their summations to the jury, and (*b*) questions put to witnesses by the prosecutors which petitioner claims to have been designed to prejudice the jury.

(*a*) Since petitioner made no objection whatsoever to either of the summations, the point has not been preserved. Nevertheless, the Court of Appeals reviewed the contentions and concluded that "there is nothing [in the arguments] of prejudicial character". The record amply justifies that conclusion. See *Malone* v. *United States*, 94 F. 2d 281, 288 (C. A. 7th), certiorari denied, 304 U. S. 562; *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (C. A. 2d).[3]

(*b*) With respect to the eight instances in which allegedly prejudicial questions were put to witnesses, it should be noted that these have been gleaned from the record of a three-weeks trial. With one exception,[4] defense objections to these questions were sus-

[3] We find no similarity between the facts of this case and those involved in the cases relied upon by petitioner (Pet. 16, 33): *United States* v. *American Die & Instrument Works*, 213 F. 2d 731 (C. A. 3); *Steele* v. *United States*, 222 F. 2d 628, 631 (C. A. 5).

[4] The exception involved a question put to the accountant who had prepared the income tax returns in question, who testified that at the time of their preparation he was assistant division chief in the Gary, Indiana, office of the Bureau of Internal Revenue. (R. 497–498.) On direct examination the Government was permitted to bring out, over the defense objection of irrelevance, that the witness had been suspended by the Bureau in 1951. (R. 502.)

tained by the trial judge. We submit that these isolated instances could not possibly have resulted in prejudice.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI.

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OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals for the Seventh Circuit (Pet. 1a-13a) affirming the judgment of the District Court has been reported as 234 F. 2d 788.

REPLY TO ARGUMENT IN GOVERNMENT'S BRIEF.

The petitioner deems it appropriate to reply briefly to some misconceptions of the questions presented, as stated in the argument in the Brief of the United States in Opposition to the grant of Certiorari.

1. The petitioner has requested this Court to accept this case for review, in part, because he "seeks to have the validity of the sentence determined by this Court" (Pet. 15), or in the alternative to have the case remanded to the District Court so that it may pass upon a motion for correction of his sentence under Rule 35 of the Federal Rules of Criminal Procedure.

The Government, at page 6 of its Brief, states that the short answer to these arguments is that the point has not been preserved. It is true that the first attempt to secure adjudication of the validity of the sentence was made during the pendency of the Petition for Rehearing in the Court of Appeals below. The petitioner's contention is based upon the decision of this Court in *Berra* v. *United States*, 351 U.S. 131. In that case this Court indicated by careful language that no challenge had been made at any time against the sentence in that case. Apparently that also included the period of pendency in the Supreme Court.

In the case at bar, the Court of Appeals below stated "We can only conclude that the majority opinion in Berra inherently impels a determination that the question before us does not reflect plain error" (Pet. 16a).

It is respectfully urged that the petitioner finds it difficult to conceive of a more manifest error involving a miscarriage of justice, than the infliction of a sentence to imprisonment and to payment of fines which are not authorized by law.

No more fundamental constitutional right exists than the right to be free of the deprivation of "life, liberty or property, without due process of law". (Amendment V, Constitution of the United States). Implicit in an excessive sentence is a usurpation of the legislative powers of Congress by the judiciary.

It is respectfully submitted that this point deserves the attention of this Court by acceptance for review or other appropriate action, as a matter of plain error affecting substantial rights. (Rule 52b, Federal Rules of Criminal Procedure).

2. In response to the Government's statement at pages 7 and 8 of its Brief that the "defense" know in 1951 that the Government had prepared a "summary of petitioner's net worth (R. 598, 599) and learned long before the trial that a thorough analysis of his banking transactions had been made (R. 415-417, 426, 495, 572)", it is submitted that the references to the Record do not sustain the Government's contention. At pages 598 and 599 of the Record, there is a described request by Agent Schreiber for submission of a net worth statement by the petitioner, but there is no statement to the petitioner that Schreiber had available any more than some "figures". The Record at pages 415-417, 426, 495, and 572, indicate no more than that Agent Schreiber talked to the petitioner many times during his investigation about several specific transactions, but there is nothing on those pages of the Record which justifies the statement that the "defense" was informed concerning the circumstantial methods of proof, that is, the bank deposit and net worth and expenditure methods of circumstantial proof. Certainly these questions about isolated transactions, and requests for a net worth statement would not permit preparation by the petitioner to meet the methods of proof introduced upon the trial. It is

difficult to comprehend the reason for the Government's firm opposition to a grant of a bill of particulars, if it did not believe that a bill of particulars might have afforded the accused assistance in the preparation of his defense, and this firm opposition would have been a useless and perilous gesture by the Government had it considered and believed that the defendant was informed of the nature of the matters he was to be required to meet.

It is further respectfully urged that the Federal Rules of Criminal Procedure suggest and contemplate sound exercise of liberal discretion in the issuance of bills of particulars for the purpose of affording the defendant fair notice of the nature and cause of the accusation against him, which may not be included or contained in "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is clear that an indictment may conform to the foregoing quotation from Rule 7(c) of the Federal Rules of Criminal Procedure and yet not afford a defendant fair notice of the nature and cause of the accusation. Such indictment is no more than "notice pleading". Among the safeguards provided for a defendant under such circumstances by the Rules of Criminal Procedure is an application for a bill of particulars. It would appear that the Courts below, in the case at bar, have fallen into the error of considering that since the indictment met the requirement of "a plain, concise and definite written statement of the essential facts constituting the offense charged", (Rule 7(c)), therefore the grant or denial of a bill of particulars was a matter of whim, or desirability on the part of the prosecutor and trial Court rather than the considered, sound, liberal exercise of discretion affording the constitutional right of the defendant to be informed of the nature and cause of the accusation in accordance with the Sixth Amendment to the Constitu-

tion of the United States. Mere technical sufficiency of an indictment in short and streamlined form should not support denial of a request for a bill of particulars, but should indicate, on the contrary, the necessity therefor, in order to afford the defendant a fair trial, as required by due process of law, and the Sixth Amendment.

The elimination of the bill of particulars under the Federal Rules of Civil Procedure and the substitution therefor of "a motion for more definite statement" under Rule 12(e) of the Federal Rules of Civil Procedure, has been justified in most quarters by the existence of generous discovery procedures contained in Rules 26 to 37 of the Rules of Civil Procedure. However, in criminal cases the most effective of these discovery procedures is not available. The deposition process, for instance, is not available to the defendant in a criminal case, under all ordinary circumstances, in contrast to the aids and safeguards afforded the civil defendant under Rules 26 to 37 of the Civil Rules of Procedure. Rules 16 and 17 of the Federal Rules of Criminal Procedure are not an adequate or parallel protection for the defendant in a criminal case, denied proper particulars, where he has been charged in "plain, concise and definite" language of the statute, with no more factual detail. Of course, no discovery process remotely equal to grand jury pre-trial investigation is ever available to an accused.

A more important and fundamental reason for the grant of a bill of particulars, lies in the fact that the Sixth Amendment to the Constitution of the United States provides for the right of the accused "to be informed of the nature and cause of the accusation".

It is respectfully submitted that since it has been generally held that the statement of an offense in the language

of the statute, as in the case at bar, would constitute a sufficient indictment, only an indulgent and generous grant of particulars will afford to defendants the protection which is their right under the Sixth Amendment.

The Court is asked to hold that the denial of the bill of particulars, sought in proper and timely fashion, and completely denied in the case at bar, was specific reversible error, and thus indicate some curb upon the growing practice of denying particulars because the indictment is held to be sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure. It is respectfully submitted that the denial of the bill of particulars in the case at bar and the continued refusal to disclose information necessary and pertinent to the preparation or presentation of defense was a violation of the petitioner's rights under the Sixth Amendment, as well as being contrary to the decisions cited heretofore in the Petition.

3. In its discussion at page 9 of its Brief of the third point made by the petitioner, the Government completely overlooks and fails to answer the petitioner's contention that Exhibit 103 (R. 449) and Exhibit 108 (R. 526) admitted over objection, were submitted to the jury without guarding instructions as to their use and consideration in the juryroom during deliberation upon verdict.

It is obvious that an instruction that the jury was the sole judge of the facts and weight to be given the testimony and exhibits (R. 918), is not a guarding instruction which would protect the accused from charts summarizing computations of other exhibits and containing bare figures which probably acquired an existence of their own, independent of the evidence which gave rise to them.

4. The Government, at page 10 of its Brief, in its allegation that the petitioner's main complaint against the instruction concerning evidence of prior good reputation concerned a misuse of the words "reputation" and "character", completely ignores the principal complaint concerning the instruction which is set forth at pages 22 through 25 of the Petition for Certiorari, and has made no answer to the petitioner's complaint against the error in the instruction, which vitiated and destroyed the effect of evidence establishing the petitioner's prior good reputation.

5. Petitioner relies upon his argument in the Petition for Certiorari with regard to this point, but suggests that the instances of inflammatory argument, misstatements by the prosecutor and questions designed for prejudice require a better justification than a statement that they did not prejudice the petitioner.

Respectfully submitted,

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